



MARYLAND STATE'S ATTORNEYS' ASSOCIATION
3300 North Ridge Road, Suite 185
Ellicott City, Maryland 21043

David Daggett
(c) 410.979.3356

O - 410.203.9881

Steven Kroll
(c) 410.979.3354

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Shallow Thoughts from an Empty Mind

Well, here we are with another summer flying by and my brain is as arid as my front lawn. Without any new and interesting appellate or Supreme Court cases in the pipeline I am hard-pressed to come up with ideas to write about and just couldn't bring myself to address another odor of marijuana case (See *Rasheed Lewis v. State* No. 1115, September Term, 2017 Court of Special Appeals - 6/28/2018.) I've read and written about so many cases lately about the odor of marijuana that I feel like I'm becoming a one-trick pony.

As Steve Kroll and I were taking a lunch-time stroll to Wal-Mart the other day and the mid-day temperature was hovering around 95 degrees in the shade, I could barely see the road from the heat coming off (Prizes to the first three to name the song). This got me thinking about animals being left unattended in vehicles and the appropriate charges and rescue actions permissible to law enforcement and the public in general. Okay, so maybe it's not the most "hot" button issue of the day, but you try coming up with a different topic each month.

There are a couple of statutes dealing with this issue, though it would also be nice if we had a "General Stupidity" catch-all statute. Perhaps that could be a legislative idea for the 2019 session.

TR § 21-1004.1 Cats or Dogs Left in Standing or Parked Vehicle

Hidden within the recesses of the Maryland Transportation Article lies §21-1004.1, which states that a person may not leave a cat or dog unattended in a standing or parked motor vehicle in a manner that endangers the health or safety of the cat or dog. While previously aware of this law, I hadn't realized that it only applies to dogs and cats and not to other animals. That really doesn't seem fair. Where was Sarah McLachlan when we needed her?

Subsection (b) allows the use of reasonable force to remove the animals from the vehicle. Unfortunately, this provision doesn't grant everyone the ability to perform a rescue. Subsection (b) only applies to the following:

- (1) A law enforcement officer;
- (2) A public safety employee of the State or of a local governing body;
- (3) An animal control officer under the jurisdiction of the State or local governing body;
- (4) An officer of a society or association, incorporated under the laws of this State for the prevention of cruelty to animals, authorized to make arrests under the provisions of §10-609 of the Criminal Law Article; or
- (5) A volunteer or professional of a fire and rescue service.

Subsection (c) states that a person may not use force of any kind to remove from the motor vehicle a dog *used by the State or a local governing body for police work while the dog is on duty* or a cat or dog *is in the custody of an animal control officer*.

Regarding subsections (b)(3) and (b)(4) above, some jurisdictions in Maryland fall under the heading of Animal Control and some fall under the heading of the Humane Society. Some others are hybrids, such as a humane society providing animal control services for the county. Some are supervised by local law enforcement. Others are not. While some officers have power of arrest, many do not, so it is probably safe to say that a large percentage would fall under subsection (b)(3) and thus be protected from liability.

For purposes of this article, let's proceed on the assumption that most citizens observing a cat or dog in distress in a locked vehicle would call 9-1-1 and request law enforcement assistance. Law enforcement is clearly covered by subsection (1). In order to use reasonable force to enter the vehicle, the officer must determine that the situation "endangers the health or safety of the cat or dog." That determination should be based on the totality of the circumstances: What is the outside temperature? Is the vehicle in the shade or the sun? Have you been advised as to how long the animal has been in the vehicle? Are the windows open? By how much? How is the feline or canine acting? Are they panting heavily? Do they appear to be restlessly pacing about? Do they have a sad, pleading look in their eyes, as if to say, "Please help me kind officer?"

A person using reasonable force to remove the animal under subsection (b) may not be held liable for any damages directly resulting from said act. So if one doesn't have a Slim Jim or other such device, breaking a window would seem to be reasonable force. A side window, not the front windshield. Oh, and check first to see if the doors are locked.

The law regarding removing a dog or cat from a vehicle doesn't apply to a Good Samaritan who confronts such a scenario. While the private citizen may contact law

enforcement or make an effort to locate the owner of the vehicle and give them a stern talking to, it's probably not advisable that they be breaking a window to rescue the animal in distress. If so, they run the risk of being confronted by the owner who might use physical force against them and/or file destruction of property charges. That being said, if such a case were to come across my desk and the Good Samaritan had been charged with Destruction of Property, I see a nol pros in their future.

The maximum penalty for a violation under this section is \$70. The hell you say! A more appropriate penalty would be to lock the pet owner in the car for an hour.

CR §10-604 Abuse or Neglect of Animal

On its face, the Maryland Criminal Law Article seems to care much more about animal welfare than does the traffic code. Not only does the Criminal Law apply equally to animals of all species, breeds, races and creeds, it carries a much more appropriate penalty: Imprisonment not exceeding 90 days or a fine of up to \$1,000. In addition, the court may order the defendant to participate in and pay for psychological counseling. The statute isn't clear as to whether that includes counseling for just the owner, or for the animal as well. Finally, the court may prohibit a convicted defendant from owning, possessing or residing with an animal. They should pass the same law for domestic abusers.

As it pertains to locking an animal in an overly hot vehicle, under CR §10-604, a person may not cause unnecessary suffering or pain on an animal; fail to provide the animal with proper drink; proper air; proper space; proper shelter; or proper protection from the weather. Any one of these conditions could apply to an animal locked in an overly hot vehicle.

I know what you're thinking – what about the Rule of Lenity and Doctrine of Merger? The Maryland Court of Appeals discussed the Rule of Lenity in the case of Oglesby v. State, 441 Md. 673 (2015). While the facts of that case are not relevant to this discussion – and had nothing to do with animal cruelty – the case nonetheless provides a nice synopsis on the issue:

The "rule of lenity" is not a rule in the usual sense, but an aid for dealing with ambiguity in a criminal statute. Under the rule of lenity, a court confronted with an otherwise unresolvable ambiguity in a criminal statute that allows for two possible interpretations of the statute will opt for the construction that favors the defendant. For a court construing a statute, the rule of lenity is not a means for determining — or defeating — legislative intent. Rather, it is a tie-goes-to-the-runner device that the court may turn to when it despairs of fathoming how the General Assembly intended that the statute be applied in the particular circumstances. It is a tool of last resort, to be rarely deployed and applied only when all other tools of statutory construction fail to resolve an ambiguity. See Gardner v. State, 420 Md. 1, 17, 20 A.3d 801 (2011). This follows from the fact that our goal in construing statutes is always to ascertain

and carry out the legislative purpose of the statute and not to seek out an interpretation that necessarily favors one party or the other. *Id.*

The Maryland Court of Special Appeals recently discussed the Doctrine of Merger in *Quesenberry v. State*, 2016 Md. App. LEXIS (2016):

"Under Maryland law, the doctrine of merger is examined under three distinct tests: (1) the required evidence test; (2) the rule of lenity; and (3) the principle of fundamental fairness." *Alexis v. State*, 437 Md. 457, 484, 87 A.3d 1243 (2014). In the instant appeal, Quesenberry contends that his cumulative convictions violate the required evidence test. "Under federal double jeopardy principles and Maryland merger law, 'the principal test for determining the identity of offenses is the required evidence test.'" *Christian v. State*, 405 Md. 306, 321, 951 A.2d 832 (2008) (quoting *Dixon v. State*, 364 Md. 209, 236-37, 772 A.2d 283 (2001)). The standard for determining whether two offenses are the same under the required evidence test is the same standard employed by the Supreme Court of the United States to determine whether two offenses are the same under *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Newton v. State*, 280 Md. 260, 266, 373 A.2d 262 (1977). **Accordingly, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."** *Blockburger, supra*, 284 U.S. at 304. In essence, under the required evidence test we ask whether it is possible in the abstract to commit each offense without also committing the other.

Upon a finding of guilt on both charges, the transportation code violation would most likely *merge* with the criminal violation, but again, TR §21-1004.1 is only a \$70 fine. *Lenity*, however is a different issue. While I've no doubt that most defense attorneys' would argue it, I don't think it would apply as there is a distinct difference between the two statutes and under the "required evidence test," one does require proof of a fact which the other does not.

The main argument under the required evidence test (and against lenity) is that under TR §21-1004.1, it is only required that the animal be left unattended *in a manner* that endangers the dog or cat. There is not a requirement that the dog or cat actually suffer any harm. CR §10-604, on the other hand, requires that the animal *actually sustained* unnecessary suffering, be it from heat, cold, lack of water, food, space, etc, so evidence of the distress is paramount. The damage does not have to be permanent.

While the Transportation Code violation only applies to cats and dogs, the Criminal Code violation applies to *all* animals. The fact that TR §21-1004.1 only applies to cats and dogs further supports the argument that the criminal violation has an additional element that must be proven, that is, sustaining actual suffering.

It otherwise makes no sense that the legislature would take our most cherished pets and make them a lesser class than all other animals, that is that their owners are only subject to a \$70 fine while owners of other animals face criminal sanctions, including incarceration. If dogs and cats were not afforded their rights under the criminal code might they not also have an Equal Protection argument?*

It would appear that the specific facts of each case will determine the appropriate charge. If there does not appear to be any suffering on the part of the dog or cat, then the Transportation Article probably applies. If there *does* appear to be actual suffering, then the Criminal Law should apply. The prosecution may want to consider bringing in a veterinarian to provide expert testimony as to the actual condition of the animal and/or the effects of prolonged heat or water deprivation on such an animal.

If you encounter a situation involving an unattended yet otherwise healthy appearing animal that is not a dog or cat, then perhaps neither statute applies. And don't even think about Reckless Endangerment!

Thanks to Adam Lippe, ASA/Baltimore County for his insight, though he probably prefers to not be associated with this blog in any manner.

AS ALWAYS, PLEASE CONTACT YOUR LOCAL STATE'S ATTORNEYS' OFFICE WITH ANY SPECIFIC QUESTIONS REGARDING THIS SUBJECT MATTER.

* I'm kidding.